

No. 11-1867 DH

On September 15, 2011, DHSS filed a complaint seeking to discipline Antwine. On September 27, 2011, we served Antwine with a copy of the complaint and our notice of complaint/notice of hearing. Antwine did not file an answer. We held a hearing on October 26, 2012. Brett Cavender represented DHSS. Antwine appeared *pro se*. The matter became ready for our decision on January 9, 2013, the date Antwine's written argument was due.

## **Findings of Fact**

1. Antwine is licensed by DHSS to operate a Family Child Care Home at her residence. This license was current and active at all relevant times.
2. Antwine's license permits a maximum of 10 children between the ages of 6 weeks and 16 years between 6:00am and 9:00pm with the following conditions:
  - A. With 10 children, no more than 4 under age 2 with 2 adult caregivers;
  - B. With 6 children, no more than 3 under age 2 with 1 adult caregiver;
  - C. With 10 children, no more than 2 under age 2 with 1 adult caregiver; or
  - D. No more than 8 children under age 2 with 2 adult caregivers.
3. Antwine spanked L.D., a two-year-old, and T.W.,<sup>1</sup> a four-year-old.
4. Antwine broke a paddle when she hit one-year-old F.N. with it.
5. Antwine spanked seven-year-old T.W. with a ruler.
6. Karmel Murray ("Murray"), Antwine's employee, spanked three-year-old D.M., one-year-old R.L., three-year-old B.M., and five-year-old R.S. with a broom and a metal spatula.
7. Based on a telephone complaint on August 2, 2010, DHSS investigators began an investigation of Antwine's child care.
8. As part of the investigation, DHSS investigators conducted an on-site investigation on August 6, 2010.
9. As part of that visit, DHSS investigators interviewed Antwine. Antwine falsely informed DHSS investigator Wanda Taylor that Murray was on vacation when she was actually caring for four children enrolled at the day care at a site away from the day care.

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<sup>1</sup> There are three children with the initials T.W. We therefore identify each child with their age and their initials.

10. On August 11, 2010, Antwine instructed Shandrea Johnson, an employee, to take some children away from Antwine's residence because there were more children under her care than her license permits.

11. Johnson took the children to the park, to the movies, and to her home. Antwine paid Johnson for these acts.

12. On August 18, 2010, Antwine told Johnson to tell DHSS investigators that child R.L. was actually B.M., a child related to Antwine.

13. On August 6, 2010, Antwine had 15 unrelated children under her care.

14. On August 10, 2010, Antwine had 14 unrelated children under her care.

15. On August 11, 2010, Antwine had 13 unrelated children under her care.

16. On August 12, 2010, Antwine had 12 unrelated children under her care.

### **Conclusions of Law**

We have jurisdiction to hear the complaint.<sup>2</sup> DHSS has the burden of proving that Antwine has committed an act for which the law allows discipline.<sup>3</sup> DHSS argues that there is cause for discipline under § 210.221, which provides:<sup>4</sup>

1. The department of health shall have the following powers and duties:

\* \* \*

(2) To inspect the conditions of the homes and other places in which the applicant operates a child-care facility, inspect their books and records, premises and children being served, examine their officers and agents, deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the department of health. The director also may revoke or suspend a license when the licensee fails to renew or surrenders the license[.]

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<sup>2</sup> Section 210.245.2. Statutory references are to RSMo Supp. 2012, unless otherwise noted.

<sup>3</sup> *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo.App. E.D. 1989).

<sup>4</sup> RSMo 2000.

In support of its cause for discipline, DHSS alleges that Antwine violated the following regulations.

Regulation 19 CSR 30-61.045(3)(V), which provides:

(3) Licensing Process.

\* \* \*

(V) All day care provided on the premises of a licensed family day care home shall be in compliance with the licensing rules and the conditions specified on the license.

Regulation 19 CSR 30-61.105, which provides:

(1) General Requirements.

\* \* \*

(D) Caregivers shall be of good character and intent and shall be qualified to provide care conducive to the welfare of children.

\* \* \*

(F) All caregivers shall cooperate with the department.

\* \* \*

(2) Licensing Capacities.

\* \* \*

(B) If the provider has an assistant present, the home may be licensed for up to ten (10) children including a maximum of four (4) children under age two (2) or for up to eight (8) children who may all be under age two (2).

Regulation 19 CSR 30-61.175, which provides:

(1) Care of the Child.

\* \* \*

(C) Discipline.

7. Physical punishment including, but not limited to, spanking, slapping, shaking, biting, or pulling hair shall be prohibited.

8. No discipline technique which is humiliating, threatening, or frightening to children shall be used. Children shall not be shamed, ridiculed, or spoken to harshly, abusively, or with profanity.

### Evidentiary Issues

DHSS introduced Petitioner's Exhibit 2 at the hearing. This exhibit is a "substantiated complaint" and contains notes of DHSS's investigation against Antwine and a listing of the regulations that DHSS's investigator believed that Antwine violated. Antwine did not object to the admission of this exhibit. This exhibit is almost exclusively hearsay. Where no objection is made, hearsay evidence in the records can and must be considered in administrative hearings.<sup>5</sup> We therefore will consider as substantive evidence all of the statements in Exhibit 2, with the exception of some statements made by Kawani Hewitt.

Antwine objected at the hearing that DHSS did not produce Kawani Hewitt ("Hewitt") as a witness. Antwine alleges that DHSS stated it would call Hewitt as a witness. Antwine alleges that if Hewitt would have testified, she would have impeached Hewitt and shown Hewitt's bias against Antwine. Although we directed Antwine to brief any instances in which DHSS relied on Hewitt's hearsay statements, Antwine did not do so. We informed Antwine that if she pointed the hearsay statements out, we would not take those statements into consideration.

Most of Hewitt's statements contained in Petitioner's Exhibit 2 are cumulative to other statements to which Antwine did not object. "A party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other

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<sup>5</sup> *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 736 (Mo. App. S.D. 2004); *Dorman v. State Bd. of Reg'n for the Healing Arts*, 62 S.W.3d 446 (Mo. App. W.D. 2001).

evidence admitted without objection.”<sup>6</sup> We may consider the cumulative statements as evidence. Many of Hewitt’s other statements are not introduced for their truth, but show why DHSS commenced and continued its investigation of Antwine. Those statements are not hearsay to show why DHSS conducted its investigation. We will consider those statements solely for the non-hearsay purpose of showing why DHSS conducted its investigation.<sup>7</sup> We will not consider Hewitt’s other statements in this decision.

#### Number of Children

Antwine exceeded the number of children under her care as permitted under 19 CSR 30-61.105(2)(B). This excess number of children also exceeded the number of children permitted under her care by her license, in violation of 19 CSR 30-61.045(3)(V).

#### Good Character and Cooperation with DHSS

Antwine instructed Johnson to take children away from the day care facility to hide the number of children under her care. Furthermore, Antwine lied to DHSS investigators regarding Murray’s whereabouts when Murray was caring for children under Antwine’s care away from the day care facility. Finally, Antwine instructed Johnson to falsely state to DHSS investigators that a child was related to her in order to hide the total number of children under her care. These false statements, instructions to her employees to make false statements, and her attempts to hide the number of children under her care at any given time indicate a lack of good character, which is a violation of 19 CSR 30-61.105(1)(D).

The false statements Antwine made to DHSS and instructed her employees to make to DHSS show a lack of cooperation with the Department, in violation of 19 CSR 30-61.105(1)(F).

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<sup>6</sup> *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 134 (Mo. 2007) (citation omitted).

<sup>7</sup> *State v. McGee*, 284 S.W.3d 690, 702 (Mo.App. E.D. 2009) (“out-of-court-statements that implicate the defendant in the crime are admissible only to the extent they are necessary to explain the subsequent police conduct testified to at trial.”).

### Discipline of Children

Physical punishment, including spanking, is explicitly prohibited by 19 CSR 30-61.175(1)(C)7. Both Antwine and Murray, her employee, spanked and hit children under Antwine's care on several occasions in violation of this regulation.

### Conclusion

Antwine violated 19 CSR 30-61.045(3)(V); 19 CSR 30-61.105(1)(D), (1)(F), (2)(B); and 19 CSR 30-61.175(1)(C)7. Violation of these regulations is cause for discipline under § 210.221.1(2).

### **Summary**

Antwine is subject to discipline under § 210.221.1(2).

SO ORDERED on June 5, 2013.

*\s\Sreenivasa Rao Dandamudi*  
SREENIVASA RAO DANDAMUDI  
Commissioner